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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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No. 76-1476

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J. W. BATESON COMPANY, INC., *et al.*,
*Petitioners*

v.

UNITED STATES OF AMERICA for and on behalf of the Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, *et al.*,
*Respondents*

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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## BRIEF FOR RESPONDENTS

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## BRIEF FOR RESPONDENTS

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### STATEMENT OF THE CASE

We accept the Petitioners' statement of the case. However, we emphasize the following findings upon which the Court of Appeals relied in reaching its decision:

> Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that con-

tract. The importance of this work is evidenced by the fact that Pierce itself hired Colquitt's employees to finish the job when Colquitt because of its financial difficulties could no longer perform.

The District Court found the relationship between Bateson and Colquitt "substantial and important". This is borne out by the nature of the work and the fact that it was performed over a substantial period of time. Moreover, it appears from the record that copies of Colquitt's payroll statement were submitted to Bateson. Since Colquitt's work was part of the main contract, was performed on the job site, and was of such obvious importance, Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise. (Pet. 4a-5a, footnote omitted.)[1]

Additionally, we point out that the fringe benefit contributions not made by Colquitt were required to fund retirement benefits and medical insurance for Colquitt's employees.

## SUMMARY OF ARGUMENT

The purpose underlying the adoption of the Miller Act was to facilitate payment to those whose labor and materials contributed to the construction of public projects. The Act provides that an action on the payment bond furnished by a prime contractor pursuant to the Act may be brought by persons having a contractual relationship with either the prime contractor or a "subcontractor". The issue now before the Court is whether certain persons who labored over a substantial period of time on a public project, performing an integral and significant part of the project work, can claim on a Miller Act bond for

[1] The reference "Pet." is to the Petition for Writ of Certiorari filed in this case. The reference "Pet. Br." is to the Brief for Petitioners.





a portion of their earnings which was not paid by their employer. Urging an overly technical, mechanistic analysis, Petitioners contend that these employees cannot claim on the bond because their employer was only a "second-tier" subcontractor. According to Petitioners, only a "first-tier" subcontractor can be a "subcontractor" within the meaning of the Act. Rejecting Petitioners' technical approach to the statute and adopting, instead, a functional approach, the Court of Appeals found the employer involved to be a "subcontractor" within the meaning of the Act, thus allowing a claim on the bond on behalf of the employees. We show below that the functional approach of the Court of Appeals is in accord with both the remedial nature of the Act and the prior decisions of this Court and, thus, that the decision below should be affirmed.

I. In finding Colquitt to be a "subcontractor" under the Miller Act, the Court of Appeals, as did the District Court before it, merely applied the test that was developed by this Court in two prior decisions, *F. D. Rich* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974) and *Clifford F. MacEvoy* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102 (1944). That test holds that one is a subcontractor if he has a "substantial and important" relationship with the prime contractor. The relationship between Colquitt and Bateson was properly found to be "substantial and important", in view of the findings that Colquitt's work was an integral and significant part of Bateson's contract with the Government and was performed on the jobsite over a substantial period of time and that Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise.

II. However, even if this case were decided without the benefit of *Rich* and *MacEvoy*, the same result reached by the Court of Appeals would be warranted. The Miller Act

is entitled to a liberal construction in order to effectuate its purpose—the protection of those whose labor and materials go into public projects. Colquitt's employees, performing work on the job site which was a significant part of the work required by Bateson's contract with the Government, were persons within this class of the Act's intended beneficiaries. Adoption of the narrow construction of the Act proposed by Petitioners would frustrate the Act's purpose of protecting those who contribute to the construction of public projects. Moreover, it would lead to arbitrary and unreasonable distinctions in coverage under the Act: some employees laboring on public projects would be held to be protected by the Act, while others would not be, despite any difference between the two groups in the nature of the work performed or the importance of their contribution to the completion of the project. Further, adoption of Petitioners' narrow construction could tend to promote disruption and delay in the completion of Government construction projects, since employees will have no choice but to quit their employment when their wages or fringe benefit contributions are not paid.

Petitioners, the Associated General Contractors and two trade associations of sureties advance an array of policy arguments for denying protection to the employees of subcontractors below the first tier. These mutually inconsistent contentions suffer from the common infirmity that they fail to appreciate that the purpose of the Miller Act is to "protect those whose labor and materials go into public projects" (*Rich, supra*, 417 U.S. at 124, quoting *MacEvoy, supra*, 322 U.S. at 107).



## ARGUMENT

### I. THE COURT OF APPEALS PROPERLY APPLIED THE DECISIONS OF THIS COURT IN DETERMINING THAT COLQUITT WAS A SUBCONTRACTOR UNDER THE MILLER ACT

In *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974) (hereafter "*Rich*"), this Court unanimously declared that, in determining coverage under the Miller Act, the "test for whether one is a subcontractor [is] the substantiality and importance of his relationship with the prime contractor" (*id.* at 123). The decision below merely applied that standard to the particular facts of this case. The Court of Appeals determined that the District Court had correctly "found the relationship between Bateson and Colquitt to be 'substantial and important'" (Pet. 5a). Bateson's petition to the Court of Appeals for rehearing *en banc* was denied without dissent. As the decision below correctly applied the appropriate test fashioned by this Court itself, that decision should be affirmed.

Before proceeding with an examination of the precedents discussed below, a brief recital of the Miller Act's history is in order. The Miller Act[2] was designed to eliminate certain procedural deficiencies found to exist under the Heard Act.[3] The Heard Act required contractors entering into construction contracts with the Government to furnish a single bond designed to protect both the Government and those who supplied labor and materials to the prime contractor in the course of performance of the contract. The Government was given the first right to sue on the bond after completion of the

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[2] Act of August 24, 1935, c. 642, 49 Stat. 793, 40 U.S.C. § 270a *et seq.*

[3] Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by Act of February 24, 1905, v. 778, 33 Stat. 811; 40 U.S.C. § 270.

work and final settlement; only thereafter could other claimants sue, and all had to join in a single action on the bond. The result was serious inconvenience and delay in recovering on legitimate claims for labor or materials supplied, and this was the flaw which the Miller Act sought to correct. The major revision enacted by the Miller Act was its requirement that the prime contractor execute two separate bonds, the first a performance bond for the protection of the Government, and the second, a payment bond for the protection of persons supplying labor or materials in the performance of the work, which could be sued upon without regard to when the Government brought suit or when the project was completed.[4]

The intended beneficiaries of the single bond required by the Heard Act, other than the Government, were defined in the statute as "all persons supplying [the contractor] . . . with labor and materials in the prosecution of the work provided for in [his] . . . contract." This language in the Act was viewed as in no way limiting the right of recovery to those who contracted directly with the prime contractor. Indeed, "how" the labor or material was supplied—i.e., to whom it was directly supplied under contract—was deemed to be irrelevant. Anyone who contributed labor or materials to the prosecution of the work was held to be entitled to sue on the bond, without regard to his particular contractual engagement. *Hill* v. *American Surety Co.*, 200 U.S. 197, 204 (1906).[5]

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[4] *See* footnote 4 in *Clifford F. MacEvoy* v. *United States, ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 105-106 (1944).

[5] "There is no language in the . . . [Heard Act] nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor, but all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished." *Hill* v. *American Surety Co.*, 200 U.S. at 204.



Some limitation on the class entitled to sue on the bond did, however, come into the law in the Miller Act. In *Clifford F. MacEvoy* v. *United States, ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 105-106 (1944) (hereinafter "*MacEvoy*"), this Court said: "There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond."[6] Nevertheless, the Court construed the Act as containing a limitation on coverage by an inference from a proviso to § 2(a) of the Act, which provides that an action on the separate payment bond furnished by the prime contractor could be brought not only by a party providing labor or materials directly to the prime, but by "any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond . . . ." The reason for this limitation is nowhere explained in the Act's legislative history. Our view is that it was deemed necessary in order to identify those persons actually "supplying labor and materials in the prosecution of the work", as opposed to those persons having more remote or ancillary connections with the project, so that the underlying purpose of

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[6] In explaining the purpose of the Miller Act, Rep. Miller stated in the House that the Act ". . . merely provides for two bonds, one for the protection of the Government's interests, and the other for the protection of the rights of labor, the subcontractors, and material furnishers." 79 Cong. Rec. 11702. Sen. Burke said in the Senate that "This bill would amend . . . [the Heard Act] by requiring an additional bond, a payment bond, for the protection of materialmen and laborers, subcontractors, and *all* who put forth their labor or furnish materials or incur expenditures in connection with the work." 79 Cong. Rec. 13382 (emphasis supplied). *See MacEvoy*, 322 at 109, n. 9.

the Act—and assured prompt payment to persons who supply labor or materials on public projects—could be more easily accomplished. Clearly, *some* means of defining the protected class entitled to sue on the payment bond had to be devised, or else every remote person whose labor or materials ultimately found its way into a public project could sue and deplete the bond to the detriment of those who made greater and more direct contributions to the completion of the project.

But while Section 2(a) of the Miller Act requires contractual privity with either the prime contractor or a "subcontractor" before a claimant may sue on the bond, Congress failed to define the term "subcontractor" anywhere in the Act. That was a task undertaken by this Court in two cases where the meaning of the Section 2(a) proviso and its requirement of privity with a "subcontractor" were directly at issue. The Court's decisions in both cases indicated that, in defining who is a "subcontractor" under the proviso and thereby determining standing under the Act, a "functional", rather than a technical, approach should be employed. Thus, although the Section 2(a) proviso requires that a claimant on the payment bond be in privity with a "subcontractor", privity is not controlling in determining whether or not the party with whom the claimant has the contractual relationship is a "subcontractor" under the Act.

The first of these cases was *MacEvoy*, *supra*. The claimant in *MacEvoy* was a supplier of certain building materials to a materialman of the prime contractor on a Government housing project. Neither the supplier nor the materialman were involved in the actual prosecution of work specified in the agreement between the prime contractor and the Government. When the materialman failed to pay the supplier, the latter sought to recover on the Miller Act bond furnished by the prime contractor, claiming that the materialman with whom he had a con-



tractual relationship was really a "subcontractor" within the meaning of the Section 2(a) proviso, thus enabling the supplier to sue on the bond. This Court disagreed. The Court defined a "subcontractor" as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract" (*MacEvoy*, 322 U.S. at 109), and excluded mere materialmen of the kind involved in *MacEvoy*, who "performed" no contract work, from the scope of this definition. The Court explained the exclusion by reference to practical considerations underlying the Miller Act:

> Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security bonds, or otherwise, for the payment of those who contract directly with the subcontractors . . . But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer. *Id.* at 110.

The second case was *Rich*, *supra*, which, like *MacEvoy*, also involved a claim on a Miller Act payment bond by a supplier of materials to another party. The question was whether this latter party was a subcontractor or materialman. This time the Court held that the supplier was entitled to maintain his action on the bond: in addition to supplying materials to the prime contractor, the party in question in *Rich* actually performed part of the contract work, and, therefore, qualified as a subcontractor. The Court explained that the term "subcontractor" should

be defined in a "functional" rather than a "technical" manner. Endorsing the definition of "subcontractor" stated in its *MacEvoy* decision ("one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract"), the Court held that the test for determining whether one fell within that definition is "the substantiality and importance of his relationship with the prime contractor." *Rich*, 417 U.S. at 123. The Court explained the reasoning underlying its test in this way:

> It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection for those few "subcontractors" with whom he has a substantial relationship in the performance of the contract. *Rich*, 417, U.S. at 123-24.

Employing this functional approach developed in *MacEvoy* and *Rich*, the Court of Appeals correctly held below that Colquitt, although technically a "sub-subcontractor" of Bateson when the relationship between the two is viewed solely in terms of contractual privity, was a "subcontractor" within the meaning of the Section 2(a) proviso. To the Court of Appeals, the critical question, in view of the approach endorsed in *MacEvoy* and *Rich*, was not whether Colquitt itself had a direct contractual relationship with Bateson, but whether "Colquitt performed work provided for in the main contract and had such a relationship with prime contractor that the prime, Bateson, could have protected itself from Colquitt's default" (Pet. 5a). On the record before it, the Court of Appeals answered each part of this question affirmatively:

> Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that contract. The importance of this work is evidenced by the fact that Pierce itself hired Colquitt's employees to finish the job when Colquitt because of its financial difficulties could no longer perform.
>
> The District Court found the relationship between Bateson and Colquitt "substantial and important". This is borne out by the nature of the work and the fact that it was performed over a substantial period of time. Moreover, it appears from the record that copies of Colquitt's payroll statement were submitted to Bateson. Since Colquitt's work was part of the main contract, was performed on the job site, and was of such obvious importance, Bateson was in a position to protect itself from Colquitt's default by obtaining security through bond or otherwise. (Pet. 4a-5a, footnote omitted.)



Thus, the Respondents, who did have a contractual relationship with Colquitt, a "subcontractor" within the meaning of the Act, were held to be proper claimants on Bateson's payment bond.

Without addressing this well-reasoned analysis, the Petitioners continue to assert that Respondent's claim under the Miller Act is just too "remote", merely because Colquitt had no direct contract with Bateson. The chief flaw in the Petitioners' "remoteness" argument is that it is grounded in the kind of technical, formalistic analysis that was specifically eschewed by this Court in *Rich* and *MacEvoy*. The Court's decisions in both cases indicated that the purpose of the Miller Act's "remoteness" limitation is to protect prime contractors from claims against which they are unable to protect themselves. But when they *can* protect themselves, there is no interest which countervails "the Congressional intent to protect those whose labor and materials go into public projects." *Rich*, 417 U.S. at 124, quoting *MacEvoy*, 322 U.S. at 107. Thus, the inquiry into "remoteness" is not to be made by mechanically counting up contractual "tiers", as Petitioners

would have the Court do; rather, it is to be made by examining the relationship between the prime contractor and the person claimed to be a "subcontractor" to determine whether it is "substantial and important", such that the prime can reasonably be expected to take steps to protect himself against the other's default. *MacEvoy*, 322 U.S. at 110; *Rich*, 417 U.S. at 123-24.

In this regard, one of the factors relied upon below by both the District Court and the Court of Appeals becomes of critical importance. Colquitt was one of the "relatively few" (*MacEvoy*, 322 U.S. at 110) contractors performing contract work *on the job site* over a substantial period of time. Thus, Colquitt was "well known" to Bateson; and Bateson could readily "protect itself from Colquitt's default by obtaining security through bond or otherwise." Pet. at 5a.[7] However, it would not have been so easy for Bateson to protect himself against the default of, let us say, an ordinary materialman, whose only connection with the project may have been that he had shipped certain pipe or pipe fittings to Pierce. Our hypothetical materialman may well be located in another state; his only contact with any contractor engaged on the project may have been in limited correspondence or brief telephone conversations with Pierce in which the order for the materials was placed. Obviously, it would be unreasonable to expect Bateson to be responsible for claims made against the materialman, knowing nothing of his operation, and never having dealt with him; such claims *would* be too "remote". But such is not the case when, like Colquitt, the party against whom the claims are made is on the jobsite, performing contract work over

[7] Clearly, Bateson was well aware of Colquitt's contractual obligations for wages and fringe benefits to its employees, which gave rise to Respondents' claim herein, since copies of Colquitt's payroll records were submitted to Bateson during the course of the work (Pet. 5a).



a substantial period of time under the prime contractor's watchful eye.

The error of the mechanistic approach to the "remoteness" issue urged by Petitioners is further highlighted by comparison of the differing results reached by this Court in *MacEvoy* and *Rich*. For, the successful claimant in *Rich* was not more "remote" in terms of Petitioner's analysis than was the unsuccessful claimant in *MacEvoy;* both were at two removes, or two "tiers", from the prime contractor. Thus, inclusion or exclusion within the class of subcontractors under the Act depends not on proximity to the prime, but rather on the nature of the work performed. Comparison of the differing results reached in *MacEvoy* and *Rich* also demonstrates that the functional approach employed by the Court of Appeals is appropriate. As the Court observed:

> In *MacEvoy* a supplier contracting with a materialman of the prime contractor could not claim against the bond because he did not have a contract with a subcontractor or perform any work on the job. However, a similar claim was allowed in *Rich* because while the supplier technically contracted with only a materialman, functionally the materialman was a subcontractor, since he performed part of the original contract and the prime contractor was in a position to protect himself against any loss from the materialman's default. The functional approach emphasizes the view originally taken by the Court in *MacEvoy* when it highlighted the remedial nature of the Act. The Court said:
>
> > The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. *MacEvoy Co.* v. *United States supra*, at 107. Pet. at 3a-4a.

Other arguments raised by the Petitioners in their attack on the decision below likewise lack merit.

First, the Petitioners argue that Colquitt cannot fall within the definition of the term "subcontractor" announced in *MacEvoy* (". . . one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract . . .") because Colquitt "performed for and took from" Pierce, not Bateson. This kind of reading of the *MacEvoy* definition obscures the realities of the situation. While, perhaps technically, Colquitt "took" its *contract* from Pierce and not Bateson, the fact of the matter is that its *work on the project* derived from Bateson's contract with the Government. As the Court of Appeals recognized:

> Colquitt was installing a sprinkler system in the addition to the hospital. The work was specifically required by Bateson's contract with the Government and was an integral and significant part of that contract. Pet. 4a.

Second, Petitioners' reliance on the one sentence of legislative history quoted at page 12 of the brief for Petitioners is unsound. A "sub-subcontractor" who, as was there explained, would be entitled to recover, is no less "remote" in terms of Petitioners' technical approach to the statute than the party who was found too remote in *MacEvoy*. Moreover, there is no indication anywhere in the legislative history that Congress intended to define the term "subcontractor" itself in terms of contractual "tiers". This Court itself has already indicated that the term is to be approached on a functional, and not a technical basis. *Rich*, 417 U.S. at 123.

Finally, Petitioners' reliance on those Circuit decisions cited at Pet. Br. 14-17 is misplaced. All of those cases cited antedate *Rich;* thus, all were decided without the benefit of the "substantial and important" test endorsed in that decision by this Court.



## II. THE RESULT REACHED BY THE COURT OF APPEALS IS CORRECT EVEN AS A MATTER OF FIRST IMPRESSION

A. Petitioners argue that the Court of Appeals "misinterpreted" *Rich* and *MacEvoy*. According to them, the "substantial and important relationship" test developed in *Rich* for determining whether one is a subcontractor under the Miller Act should not have been applied by the Court of Appeals in the context of this case. Apparently, Petitioners would confine application of that test only to situations where at issue is whether one is a subcontractor or a materialman. (See Pet. Br. at 12). We doubt that *Rich* should be read as narrowly as Petitioners propose; but if so, then *MacEvoy*, too, must be confined to its facts, which, of course, involved a claim by a materialman of a materialman. For, while *Rich* and *MacEvoy* are mutually consistent if understood (as the Court of Appeals understood them) to declare a functional, rather than a technical test for coverage, it is the later case, *Rich*, which is the more authoritative precedent if there is any tension between them.

But let us assume *arguendo* that the Petitioners are correct on this score, and assume, further, that this Court were called upon to decide this case without the benefit of *Rich* and *MacEvoy* and as a case of first impression. Respondents submit that, were this the case, the same result reached below by the Court of Appeals would be required and the Respondents' right to claim on Bateson's payment bond would have to be upheld.

In *Fleisher E. & C. Co.* v. *United States*, 311 U.S. 15, 17 (1940) Mr. Chief Justice Hughes wrote for a unanimous Court:

> In construing the earlier Act, the Heard Act, for which the Miller Act is a substitute, we observed that it was intended to be highly remedial and should be construed liberally.

He explained further that under the Heard Act,

> a requirement which is clearly made a condition precedent to the right to sue must be given effect, but in determining whether a provision is of that character the statute must be liberally construed so as to accomplish its purpose. "Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute." Illinois Surety Co. v. John Davis Co., 244 U.S. 376. (*Id.* at 18.)

He added, "The same principle should govern the application of the Miller Act." *Id.*

Extending the protection of the Act to Colquitt's employees would be fully consistent with its object and appropriate under the liberal construction to which the Act is entitled. Colquitt was performing contract work on the job site; thus, his employees were persons actually "supplying labor . . . in the prosecution of the work" provided for in Bateson's contract—among the specific class of persons sought to be protected in Section 1(a)(2) of the Act and designated in Bateson's payment bond itself.[8] In view of the Act's intent, there is no reasonable basis for extending the protection of the Act to, let us say, Pierce's employees—and denying it to Colquitt's; both groups were contributing their labor on the jobsite to the completion of Bateson's contract work. The anomaly of Petitioners' construction of the Act is particularly striking, when it is remembered that after Colquitt defaulted, the same employees continued to perform the same work on the project as Pierce's employees (see Pet. 4a-5a); under Petitioners' construction, it was only then that the employees enjoyed protection of the Act.

As previously noted, the Heard Act, the Miller Act's predecessor, was construed to allow any person who contributed labor or materials to a public project to claim

[8] The bond itself adopted the language of the Act: ". . . all persons supplying labor and material in the prosecution of the work provided . . . for in said contract. . . ." (A. 17)



on the prime contractor's bond, without regard to whom his contract was with. *Hill* v. *American Surety Co.*, 200 U.S. 197 (1906). The Miller Act was enacted merely to remove the procedural obstacles to recovery found to exist under the earlier measure and thus make it easier for unpaid creditors to recover on the bond. *MacEvoy*, 322 U.S. at 105-06. In view of this specific purpose of providing greater protection to unpaid creditors than that afforded under the Heard Act, a construction of the Miller Act that would deprive a significant proportion of previously covered employees of the protection of a bond, would largely defeat the avowed intent of Congress. See the statements of the sponsors quoted at p. 7, n. 6 *supra*.

In terms of the language of the Act, the issue ultimately comes down to whether the term "subcontractor" in the proviso to § 2(a) was intended to mean "first-tier subcontractor" or was intended as a generic term including all those who take a part of the prime contract and perform it on behalf of the prime contractor. We submit that if the former meaning had been intended it would have been a simple matter for Congress to say so, for example, by using the adjective "first-tier" or by a limiting phrase such as "subcontractor who has contractual relationship with the prime contractor". On the other hand, for Congress to have articulated the proposition that subcontractors other than first-tier subcontractors are also eligible in any manner other than the use of "subcontractor" in its generic sense would have been exceedingly cumbersome. The phrase would have then had to read something like this: "Provided, however, That any person having direct contractual relationship with a subcontractor *or sub-subcontractor or sub-sub-subcontractor or sub-sub-sub-subcontractor*, etc. but no contractual relationship express or implied with the contractor * * *". Moreover, this awkward phraseology would have given the courts no authority to deny recovery to those lower-tier subcontractors whose contribution was unsubstantial or unimportant. It is also to be noted that the broader, generic

interpretation of "subcontractor" gives full effect to the notice requirement in the proviso, for such lower level subcontractors (and laborers and materialmen who made claims because of their default) would by the same token be required to provide notice to the prime contractor as a condition for suit or the bond. Respondents of course complied with that condition herein.

In construing the Miller Act to require the prime contractor, through the device of the payment bond, to be ultimately responsible to a second-tier subcontractor's employees, the Court would not be imposing any duties upon the prime remarkably different from others which the prime already owed to those employees. The courts have long recognized that a prime contractor does have certain duties toward *all* employees at work on the jobsite, without regard to which contractor, subcontractor, "sub-subcontractor" they are employed by. For example, Bateson, as a prime, owed Colquitt's employees a duty of reasonable care to prevent injury from hidden defects on the job site (*see, e.g., Meny* v. *Carlson*, 6 N.J. 82, 77 A.2d 245 (1950); *Smith* v. *Henger*, 148 Tex. 456, 226 S.W.2d 425 (1950); *Annot.*, 20 A.L.R.2d 870 (1950)). *See also Anning-Johnson Company* v. *United States Occupational Safety and Health Review Commission*, 516 F.2d 1081 (7th Cir. 1975), where, in holding that subcontractors could not be held liable for certain safety violations they did not create, the Court of Appeals recognized that it is the prime contractor on a construction suite who controls the work site, and who would be responsible. Thus, allowing Respondents to claim on Bateson's payment bond will hardly result in the kind of radical restructuring of traditional relationships between prime contractors and subcontractors that Petitioners have suggested would result. (Pet. 12.)

As the complexity of construction work has increased, so, too, has specialization among industry contractors.



The case at bar offers just one example: Bateson, charged with overall responsibility for construction of the Howard University Hospital addition, brought in Pierce to perform the "mechanical" work required under the contract. Pierce itself apparently was unwilling to perform installation of the sprinkler system required by the contract and, thus, brought in Colquitt, a contractor who specialized in that particular branch of the mechanical construction industry, although as events proved, Pierce was quite capable of performing the work itself. With specialization among construction industry contractors has come the opportunity for more "sub-subcontracts", "sub-sub-subcontracts", etc. (Of course, however, the total amount of the prime's contract work remains constant, no matter among how many lower tier contractors the work is divided.) If Petitioner's approach to the Miller Act prevails, the result will be a substantial shrinkage in the class of persons protected by the Act, as more employees engaged on public projects are found working for speciality "sub-subcontractors", "sub-sub-subcontractors", etc. Substantially shrinking the class of protected persons is wholly at odds with the declared Congressional intent "to protect those whose labor and materials go into public projects." *MacEvoy*, 322 U.S. at 107.

Petitioners argued below to the Court of Appeals and to the District Court that certain "self help" remedies were available to the Respondents which should have been pursued in lieu of claiming on the payment bond. One of these "self help" measures was the right of Respondent Local 669 under its collective bargaining agreement with Colquitt to call a strike if the pension and welfare fringe benefit contributions were not paid.[9] While Re-

[9] Article 25 of the agreement gives Local 669 the "right to remove employees from any job or jobs of the employer or to take other legal economic action against the employer if fringe contributions due and payable are not made". See Appendix 40, 47, 54.

spondent Local 669 could have exercised this right to call a strike when Colquitt did not make the required payments, it chose not to do so in this case. However, foreclosing employees such as Colquitt's from coverage under a payment bond will leave other employees on other Government projects under similar circumstances no choice but to quit their employment when their wages or fringe benefit contributions are not paid. *Cf. Anning-Johnson Company* v. *United States Occupational Safety and Health Review Commission, supra,* at 1090.

While we do not claim that the purpose of the Miller Act was to achieve industrial peace, it is highly incongruous to so construe the Act that employees are bereft of protection and are constrained to utilize self-help as the sole alternative to working for less than the agreed-upon wages and fringe benefits. The United States has two concerns: To achieve completion of the construction projects for which it has contracted without unnecessary delay and to protect those who make a substantial and important contribution to the project against loss due to the default of the party with which they deal. The construction advanced by petitioners and their allies subverts both of these interests. Instead, Petitioner Bateson advances the argument that under the Court of Appeals' construction, "the increased cost of the bond premiums will ultimately be passed on the government in the form of increased prime contract prices" (Pet. Br. 18, n. 15; see also Petition for Certiorari pp. 13-14). We submit that the very suggestion is "a tacit slander of the Nation's credit".[10] In any event, it reverses the actual Congressional order of priorities embodied in this legislation, without which there would be no bond requirement and no premium expense whatsoever.

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[10] The phrase is that of Jackson, J. dissenting in a tax case, *Lykes* v. *United States*, 343 U.S. 118, 129 (1952).



**B.** In an effort to lend plausibility to their restrictive interpretation of the Miller Act, Petitioners, and the *amici* on their side, advance a whole array of policy arguments. Not only are these arguments highly speculative in nature; they are also based upon fundamental misconceptions of the legislative intent underlying the Miller Act. Interestingly, the two *amici* propose differing versions of what the Miller Act is all about. Each believes it to be an Act for the relief of the class of enterprises which it represents. Both are wrong.

According to *amici* Surety Association of America and the American Insurance Association, the intent of the Miller Act was to protect those whose labor and materials contributed to public projections, while at the same time limiting the risk of exposure of the *surety companies* (Surety Assoc. Br. at 4).[11] As this Court said in *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947) "* * * the statutory provisions requiring a separate bond for payment of laborers and materialmen were enacted for their benefit, not to the detriment of the government. It is the surety who is required to take risk" (*id.* at 243-244).

*Amicus* Associated General Contractors of America, on the other hand, views the Miller Act as intended to benefit the *prime contractor* on Government projects. The reforms of the Heard Act made in the Miller Act, it is asserted, were intended to ". . . emphasiz[e] and facilitat[e] prompt payment to those within the purview of the Act, with, however, safeguarding limitation of the class to which the right of action was afforded, and no-

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[11] The reference to "Surety Assoc. Br." is to the Brief of the Surety Association of America and the American Insurance Association, as *Amici Curiae*. The reference to "Assoc. Gen. Contr. Br." is to the Brief of the Associated General Contractors of America as *Amicus Curiae*.

tice and limitation period for suit, all to enable the *contractor* safely to make payments promptly to its subcontractors without the hazard of later double payment" (Assoc. Gen. Contr. Br. at 3) (emphasis added). Again, there is nothing in the Act or its legislative history to indicate that the Act was intended to benefit anyone other than those persons who supplied labor and materials to a prime contractor in the construction of public projects.

It is argued, that, if allowed to stand, the lower court's decision will "materially expand the payment bond risk by imposing on the prime contractor and the surety *virtually unlimited* responsibility" for the payment of debts (Surety Assoc. Br. at 12) (emphasis added). (*See also* Assoc. Gen. Contr. Br. at 16.) The results of an increase in the risk factor, it is further argued, will be a decline in both the bonding capacity of contractors and the willingness of the sureties to underwrite bonds (Surety Assoc. Br. at 14-16). The assertions that the payment bond's risk factor will be "materially expanded" and that contractors and sureties will be open to "unlimited" liability ignore the particularistic, narrow findings on which the Court of Appeals based its decision: that the relationship between Colquitt and Bateson was "substantial and important", in that Colquitt performed work which was an integral and significant part of Bateson's contract work, in that Colquitt performed on the job site over a substantial period of time, and in that Bateson was in a position to protect itself by obtaining security against Colquitt's default (Pet. 4a-5a). When these findings are duly noted and the decision below thus correctly viewed, that decision can hardly be construed as exposing prime contractors or their sureties to "unlimited" risks. A "sub-subcontractor" not performing on the job site over a substantial period of time,



would not pass muster as a "lower tier subcontractor" under the Court of Appeals' holding. Certainly, a materialman of a materialman would not, for the court of course did not disturb the holding of *MacEvoy*. Since only the "relatively few" contractors who stand in a "substantial and important" relationship with the prime fall within the scope of the lower court's holding, any resulting increase in the payment bond risk factor should be slight.

It is further argued at Surety Assoc. Br. 12 that, in any event, the "substantial and important" test itself is uncertain and not well-suited to application because it is difficult to "draw the line" among those relationships which are and those which are not "substantial and important". Respondents perceive no difficulty at all in identifying those "relatively few" (*MacEvoy*, 322 U.S. at 110) contractors, performing contract work on the job site, with whom the prime has a "substantial and important" relationship. The law is replete with similar tests, functional in nature, which permit judges and juries to reach equitable results in different factual contexts.[12] As Mr. Justice Frankfurther wrote, "the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment." *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 198 (1941).[13] But if the "substantial and important" test

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[12] Consider for example, the "reasonable man" test so familiar in various branches of the law.

[13] *Phelps Dodge* is not alone in construing the National Labor Relations Act to require consideration of the "totality of circumstances" (see *NLRB* v. *Pipefitters*, 429 U.S. 507, 521, n. 8, 524 (1977)) and disapproving "mechanical answers" (*Labor Board* v. *Steelworkers*, 357 U.S. 367, 364 (1958)) where Congress has not, in terms, established such a test. See also, *e.g.*, *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 482, nn. 4 and 5 (1960); *Teamsters Union* v. *Labor Board*, 365 U.S. 667, 676 (1961); *Labor Board* v. *News Syndicate*, 365 U.S. 695, 699-700 (1961) (disapproving *per se* tests).

is uncertain, it would appear that this Court itself—which formularized the test in *Rich*—felt disposed to tolerate some uncertainty in the interest of construing the Miller Act in a manner consistent with its underlying intent.

A direct attack is made at Surety Assoc. Br. 16 on this Court's reasoning in *MacEvoy* and *Rich*, and adopted in the decision below, that a prime contractor can protect himself against claims on its payment bond by requiring "downstream" bonds [14] from other contractors on the job with whom the prime has a "substantial and important" relationship. The Association argues that it is impractical, given the number of parties on a construction project, to require the surety to warrant against default by all of them. However, this objection is exaggerated for two reasons: First, the Court of Appeals' test construes the coverage requirement as applicable only to those downstream contractors who take a "substantial and important" part of the original contract; their number, as distinguished from that of all subcontractors and materialmen who may have some part in the project, is readily manageable. Second, the Association's impracticality argument founders on the record of this case, for Bateson did, in fact, insist upon bonds from the subcontractors with whom it dealt directly; Pierce, the plumbing subcontractor, could have imposed a similar requirement on Colquitt had it chosen to do so. And the Associated General Contractors argue that "many small business contractors" have difficulty in obtaining bonding and therefore will find themselves unable to participate under federal contracts. (Assoc. Gen. Cont. Br. 15-16.) We think it fair to say that very few general contractors or others engage in transactions with other parties whose financial responsibility is in doubt without safeguarding

[14] The term is that of one brief *amici*, and is not to be found in the statute or this Court's decisions.



themselves from the attendant risks; it comes with somewhat poor grace for their trade association to contend that employees should be required to assume the risk of nonpayment of wages and other benefits. In any event, the Miller Act is not an Act for the relief of small businesses or financially weak enterprises, and the effort to attribute that intention to Congress is no more plausible than the contentions that it is for the benefit of prime contractors or their sureties. It is a paradoxical suggestion that the protections of the Miller Act should be denied to those employees who need them the most, because the contractor's financial standing is so questionable that no surety will provide a bond.

The argument is made at Surety Assoc. Br. 8 that, since Bateson didn't select Colquitt to perform on the job, neither Bateson nor its surety should be expected to guarantee Colquitt's obligations to its employees. But it is the prime contractor who determines whether to perform a particular part of the work itself, or to subcontract it directly, or to permit subdelegation by the subcontractor with whom it has direct dealings. For example, Bateson could have chosen to install the sprinkler fittings with employees it hired, or to contract directly with Colquitt or some other sprinkler fitter contractor. The choice between these alternatives is made by the prime contractor for business reasons which are good and sufficient to it, including its own capabilities, and, in the final analysis, the method which is likely to be the most profitable given the capital that the prime contractor wishes to invest in the project. We do not for a moment question the right of prime contractors to make such choices. But we do seriously challenge the proposition that it is desirable public policy to shift the risk of default by a subcontractor to that subcontractor's employees because the prime contractor has subcontracted an "integral and significant" (Pet. 4a) portion of the contract and has opted to allow further subdelegation. Our understanding of the free en-

terprise system is that entrepreneurs are entitled to seek profit, but it is they who assume the financial risks, not their workers. And we are confident that Congress so understood it when it adopted the Miller Act to cure the procedural infirmities of the Heard Act.

## CONCLUSION

The decision of the Court of Appeals properly applied the decisions of this Court and construed the Miller Act in a manner consistent with its underlying intent. The Petitioners urge a mechanistic approach to the Miller Act which would frustrate that intent and would lead to arbitrary, unreasonable distinctions in extending the protection of the Act to persons whose labor and materials contribute to the construction of public projects. The Petitioners' approach should be rejected, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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